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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 711 702

MARION F. JOHNSON,

Petitioner,

vs.

THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

The petition of Marion F. Johnson respectfully shows to this Honorable Court:

I

Petitioner is a citizen and resident of the United States and of the State of Florida. He was informed against in the Circuit Court of the Twelfth Judicial Circuit of Florida, in and for Lee County, July 28, 1945 upon an Information (R. 1-3) charging in three counts the single offense of conducting a lottery under Section 849.01 Florida Statutes Annotated. To this Indictment petitioner filed his Motion to Quash (R. 3-10) alleging that the Information was based

upon evidence procured under a purported Search Warrant issued upon an insufficient affidavit in that said Search Warrant and affidavit were insufficient to justify the search of a dwelling house in that they do not allege that the said premises were in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel, or boarding or lodging house, or that the same was being used for the unlawful sale, possession or manufacture of intoxicating liquor or that stolen or embezzled goods were contained therein as provided by Section 933.18 F. S. A.; and that the evidence thereby illegally obtained was used by the State of Florida, its officers and agents for the purpose of obtaining said Information, and that the Information is based upon said evidence so illegally obtained for which reason he averred that the said Information is null, void and of no force and effect; and that the evidence upon which the Information was based was obtained by the unlawful execution of said Search Warrant in that the officers and agents of the State of Florida, in their efforts to serve the same, did break open the outer door of defendant's dwelling house without giving due notice of their authority and purpose prior to their entry therein, as required by Section 933.09 F. S. A.; and that said officers and agents of the State of Florida, in executing the said purported Search Warrant, willfully exceeded their authority contrary to Section 933.17 F. S. A. Said Motion to Quash was filed pursuant to Section 909.02 F. S. A. under which the factual allegations are recognized by the Courts of Florida, as pleas in abatement. Petitioner's Motion to Quash the Information was argued to the Court and after hearing argument the Court overruled and denied said Motion without hearing any evidence thereon (R. 10), to which ruling petitioner objected on the ground that it denied him due process of law as guaranteed by the Federal Constitution (R. 112). Thereafter, petitioner filed his Motion to Suppress the evidence unlawfully

seized from his dwelling house and for the return of the articles thereby seized (R. 10-12). Said Motion to Suppress the evidence and to return the articles illegally seized from his dwelling house set up issuable facts which, if proven, would be sufficient to support his Motion to Suppress and for a return of the property seized under the illegal Search Warrant. Thereupon, the State of Florida, by its attorneys, presented a Motion to Strike petitioner's Motion to Suppress the evidence in this case, and the Court, after hearing said evidence, declined to consider and weigh the same or to determine the issues raised thereby, but granted the State's Motion to Strike, and denied defendant's Motion to Suppress the said evidence (R. 13). Thereafter, the evidence procured by the search and seizure was offered and received over the objections of the petitioner (R. 117, 118, 119, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 145, 152, 153, 164, 170, 171, 179, 182, 185, 190, 202, 205). The jury rendered its verdict against your petitioner, finding him guilty of conducting a lottery upon all of the three counts of the Information. Thereafter, petitioner filed his Motion for a new trial (R. 17-18) in words and figures following:

> "Now comes the defendant, MARION F. JOHNSON, and within four days of the finding and rendition of verdict in the above entitled cause and during the same term of court, and moves the court to vacate and set aside the said verdict for the following reasons and upon the following grounds, to-wit:
>
> 1. The verdict is contrary to law.
>
> 2. The verdict is contrary to the evidence.
>
> 3. The verdict is contrary to and not supported by either the law or the evidence.
>
> 4. The court erred in overruling and denying defendant's motion to suppress the evidence obtained by an illegal search and seizure.

5. The court erred in refusing to determine prior to the trial or upon objections at the trial the legality of the said search and seizure.

6. The court erred in sustaining the Motion of the State to strike those portions of defendant's Motion to Quash the indictment that were based upon factual grounds.

7. The court erred in overruling and denying that portion of defendant's Motion to Quash that was based upon matters of law evidenced by the record.

8. The court erred in overruling and denying defendant's objections to the introduction and consideration in evidence of articles and papers illegally seized from the private dwelling house of the defendant.

9. The court erred in overruling and denying defendant's objections to the introduction of testimony concerning matters and things that came to the knowledge of the State by reason of the illegal search and seizure of papers, goods and effects from the private dwelling house of the defendant.

10. The court erred in allowing the jury to determine the admissibility of the evidence obtained by the illegal search of the defendant's private dwelling house.

11. The court erred in determining that the search warrant upon which the evidence against the defendant was obtained was sufficient in substance and form.

12. The court erred in holding that a private dwelling house that was not used in part for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding or lodging house, or for the unlawful sale of intoxicating liquors and in which no stolen or embezzled property was contained, was liable to search and seizure under the laws and constitution of the State of Florida.

13. The court erred in holding that that part of Section 933.18 F. S. A. is unconstitutional insofar as it would limit the search of a private dwelling house to the purposes described in the first paragraph of said statute.

14. The court erred in defining the term 'bolita' in the instructions to the Jury.

"For all of which matters and things above urged and insisted upon, defendant avers that he has been denied due process of law in contravention of Sections 12 and 22 of the Declaration of Rights of the Constitution of the State of Florida and of Section One of the Fourteenth Amendment to the Constitution of the United States."

Thereafter, his said Motion came on to be heard, and the same was overruled as to the first two counts of the Information and was sustained, and he was granted a new trial, upon the third count of the Information, the said Order being in words and figures following (R. 18-19):

"This cause coming on to be heard upon defendant's motion for a new trial and the same having been argued by counsel and the Court being fully advised in the premises,

"IT IS THEREUPON CONSIDERED, ORDERED AND ADJUDGED that the said motion be, and the same is hereby denied on each and every ground thereof, except as to the third count of the information, and as to said third count, motion for new trial is granted on the ground that the verdict is not sustained by the proof, to which ruling as to first and second counts defendant by counsel enters his objection and exceptions thereto.

"And it further appearing to the Court that additional time will be needed for the reporter to prepare a transcript of his notes in this case,

"IT IS THEREUPON CONSIDERED, ORDERED AND ADJUDGED that the time for filing the transcript be, and the same is hereby extended for a period of *ninety* days.

"DONE AND ORDERED in Fort Myers, Florida, this 24th day of November, A. D. 1945."

Thereafter, on the 24th of November, 1945, the Court entered judgment and sentence upon the first two counts of the Information in words and figures following (R. 16):

"You having been tried by a Jury and convicted of the crime of Conducting a Lottery, as charged in

the first and second counts of the Information on file herein, the Court therefore adjudges you to be guilty of the crime of Conducting a Lottery, as charged in the first and second counts of the Information on file herein, it is therefore the judgment of the court and the sentence of the law, that you, Marion F. Johnson, for your said offense, do be confined by imprisonment at hard labor in the State Prison of the State of Florida, for a period or term of eighteen (18) months, on each of said counts, to run concurrently. Thereupon the defendant was remanded to the Sheriff."

to which judgment and sentence petitioner gave notice of appeal to the Supreme Court of the State of Florida (R. 1), and therein filed his assignment of errors in words and figures following (R. 19-21):

"Now comes the defendant in the above entitled cause and within the time allowed by law files this his assignment of errors or grounds for appeal upon which he intends to rely for reversal of the judgment and sentence in said cause.

1. The court erred in denying and overruling the motion of the defendant to suppress the evidence obtained by the search of his private dwelling house.

2. The court erred in overruling and denying that part of defendant's motion to quash the information in which the defendant set up factual grounds and prayed for the same advantage as if he had filed the same by way of a plea in abatement or a plea in bar.

3. The court erred in overruling and denying the motion of the defendant to quash the information upon the grounds therein shown by the record.

4. The court erred in sustaining motion of the State of Florida to strike that portion of defendant's motion to quash based upon factual and legal grounds in which he prayed that he might have the same advantage as if he had pleaded the same in abatement or in bar of said cause; and in striking said portions of said motion the court denied him due process of law and the

equal protection of the laws of the State of Florida, contrary to Sections 12 and 22 of the Declaration of Rights of the Constitution of the State of Florida and Section One of the Fourteenth Amendment to the Constitution of the United States.

5. The court erred in denying defendant's motion to suppress the evidence obtained by the unlawful search of his dwelling house and thereby denied him due process of law and the equal protection of the laws of the State of Florida, contrary to Sections 12 and 22 of the Declaration of Rights of the Constitution of the State of Florida and of Section One of the Fourteenth Amendment to the Constitution of the United States.

6. The court erred in interpreting Section 933.18 F. S. A. to allow the search of a private dwelling occupied as such, when not being used for the unlawful sale, possession or manufacture of intoxicating liquors, and no stolen or embezzled property was contained therein, when such private dwelling was not in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding or lodging house.

7. The court erred in overruling the objections of the defendant to the introduction and reception in evidence of articles obtained by means of the unlawful search of his private dwelling house and of other evidence obtained by information thus obtained.

8. The court erred in admitting in evidence over the objection of the defendant, articles illegally obtained by means of the unreasonable search of his private dwelling house and the seizure of articles therefrom and the evidence obtained by reason of such seizure without determining the admissibility thereof prior to its reception in evidence; and in such rulings the Court denied the defendant due process of law and the equal protection of the laws of the State of Florida in contravention to Sections 12 and 22 of the Declaration of Rights of the Constitution of the State of Florida and of Section One of the Fourteenth Amendment to the Constitution of the United States.

9. The Court erred in allowing the jury, over the objections of the defendant, to determine the admissibility of evidence contended by the defendant to have been obtained by an unlawful search of his private dwelling house and the unlawful seizure of property obtained by said search and the evidence derived therefrom.

10. The court erred in denying and overruling defendant's motion for a new trial, said motion being predicated upon the several grounds therein contained.

11. The court erred in holding that the evidence was sufficient to support the verdict upon each of the counts in said information.

12. The court erred in holding that the evidence was sufficient to support the verdict upon any of the counts in said information.

13. The court erred in entering judgment and sentence."

II

Thereafter, July 9, 1946, the Supreme Court of the State of Florida entered its judgment affirming the judgment of the Circuit Court of Lee County, Florida, in words and figures following (R. 36):

"This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellee do have and recover of and from the Appellant its costs by it in this behalf expended, which costs are taxed in the sum of $——, all of which is ordered to be certified to the Court below.

> "The Opinion of the Court in this cause prepared by Mr. Justice Buford was this day ordered to be filed."

The opinion of the Supreme Court of Florida in said cause, is set forth in full in the record of this cause (R. 25-36).

Thereafter, petitioner filed his petition for rehearing in said cause (R. 37-65), and his request that said petition be heard en banc by said Court (R. 65-66).

Thereafter, to-wit: on the 12th day of September, A. D. 1946, the Supreme Court of Florida denied his petition for rehearing in words and figures following (R. 66):

> "Counsel for appellant having filed in this cause petition for rehearing and it having been considered, it is ordered that said petition be and the same is hereby denied."

Thereafter, to-wit: September 13, 1946, the Court denied his request that said petition be heard en banc.

III

Petitioner represents that he is advised and believes and thereupon states the fact to be that the Circuit Court of Lee County, Florida has decided Federal questions of substance not in accord with the applicable decisions of the Supreme Court of the United States, and that the Supreme Court of Florida, by affirming the judgment of the Circuit Court of Lee County, Florida has denied to him due process of law and the equal protection of the laws of the State of Florida in the following particulars, to-wit:

(a) The Circuit Court of Lee County, Florida denied petitioner due process of law and the equal protection of the laws of Florida in contravention to Section One of the

Fourteenth Amendment to the Constitution of the United States by sentencing him to eighteen months imprisonment in the State Prison without trial, after the said Court had reversed the prior verdict and judgment against him and granted him a new trial and before such new trial could be had.

(b) The Circuit Court of Lee County, Florida denied him due process of law and the equal protection of the laws of the State of Florida by denying him the right to a hearing upon his Motion to Quash the Information upon factual grounds, the said Motion being in effect a plea in abatement of the said action and a defense thereto recognized by the laws of the State of Florida.

(c) The Circuit Court of Lee County, Florida denied him due process of law and the equal protection of the laws of the State of Florida by refusing to determine his Motion to Suppress and to return to him articles of evidence illegally seized from his dwelling house; and by requiring the jury to determine the legality and admissibility of such evidence over his objection and exception.

(d) The Supreme Court of Florida, by varying its rules of construction of statutes and adopting a different rule for construction of Section 933.18 F. S. A., has determined that the last paragraph of said statute is in conflict with the first paragraph thereof, and has thereby discarded or modified the first paragraph to the prejudice of petitioner; and the interpretation so rendered is at variance with the rules of construction of statutes applied by the Courts of Florida at the time of the alleged search and of the commission of the alleged offense, thus rendering said statute *ex post facto* and depriving him of his rights thereunder, which said ruling petitioner avers to be contrary to Section 10 of Article One of the Constitution of the United States, and

Section One of the Fourteenth Amendment to the Constitution of the United States. The said statute as interpreted by the court was cited and called in question in his Petition for Rehearing. The statute as enacted by the Legislature is as follows: (emphasis ours)

> "No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless it is being used for the unlawful sale, possession or manufacture of intoxicating liquor, or stolen or embezzled property is contained therein, or *unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding or lodging house.* The term private dwelling shall be construed to include the room or rooms used and occupied, not transiently but solely as a residence, in an apartment house, hotel, boarding house or lodging house.
>
> "No warrant for the search of any private dwelling shall be issued except on sworn proof by affidavit of some credible witness that he has reason to believe that the laws prohibiting the unlawful sale, possession or manufacture of liquor, are being violated in such dwelling, or that stolen or embezzled property is contained in said dwelling, or *that such dwelling is being used to carry on gambling, or being used to perpetrate fraud and swindles.* The affidavit shall set forth the facts on which such reason or belief is based."

IV

Petitioner further represents that the rights, privileges and immunities specially set up and claimed by him in the Circuit Court of Lee County and in the Supreme Court of the State of Florida, under the Constitution of the United States, justify a review of the decisions of said Courts by the Supreme Court of the United States by virtue of Section 344, Title 28 F. C. A., the same being 237 of the Judicial Code as amended. Petitioner further represents that the

said decision of the Supreme Court of Florida, affirming the judgment of the lower court, deprived petitioner of due process of law in contravention to Section One of the Fourteenth Amendment to the Constitution of the United States, and that the statutes herein set forth, as construed by the Supreme Court of Florida, have now become *ex post facto* laws to the prejudice of the petitioner, contrary to Section Ten of Article One of the Constitution of the United States.

V

A certified copy of the record in said case in said Supreme Court of Florida is hereby furnished, attached to and made a part of this application, marked EXHIBIT "A".

VI

The errors assigned for the consideration of this Court are those assigned and affirmed by the Supreme Court of Florida as set forth in Paragraph I of this Petition; and the Points to be Argued are those set forth in (a), (b), (c), and (d) of Paragraph III of this Petition. And these are argued in the Brief hereto attached, which is made a part of this Petition as if set forth herein *haec verba*.

VII

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Florida, commanding the said Court to certify and send to this Court, on a day therein to be designated, a full and complete transcript of the record and all proceedings of the Supreme Court of Florida in the said case entitled Marion F. Johnson, Appellant *vs.* State of Florida, Appellee, to the end that said case can be reviewed and determined by this Court as provided by the rule of this Court and by the statute in

such case made and provided, and that your petitioner may have such other and further relief or remedy in the premises as this Court may deem aupropriate and in conformity with the rules of this Court and the said statutes, and that the said judgment of the Supreme Court of Florida in the said case and every part thereof may be reversed by this Honorable Court.

MARION F. JOHNSON,
Petitioner.

W. D. BELL,
R. K. BELL,
Counsel for Petitioner.

STATE OF FLORIDA,
County of Lee:

Before the undersigned authority this day personally appeared Marion F. Johnson, who, being by me first duly sworn, deposes and says that he is the petitioner described in and who has subscribed the within Petition for Certiorari; that he is familiar with the contents thereof, and that the matters and things therein set forth, charged and alleged are true, except as to matters of law and these he believes to be true.

MARION F. JOHNSON.

Sworn to and subscribed before me this 13th day of November, A. D. 1946.

D. F. FARABEE,
Clerk Circuit Court, Lee County, Florida;
[SEAL.] By A. N. ODOM,
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 111 702

MARION F. JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA

BRIEF AND ARGUMENT FOR PETITIONER

Preliminary Statement

This cause is before the Court upon Petition for Writ of Certiorari for review of the Judgment of the Supreme Court of Florida, in the case of Marion F. Johnson, Appellant, *vs.* State of Florida, Appellee, therein lately pending.

The petition is attached hereto and made a part of this Brief and comprehends all of the matters set forth in Rule 27 of this Court. The errors assigned are those assigned in the Supreme Court of Florida to the Judgment and Rulings of the Circuit Court of Lee County, Florida, as affirmed by the Judgment of the Supreme Court of Florida and set forth in Paragraph I of the foregoing petition and summarized as points to be argued in Subsections (a), (b), (c), and (d) of Paragraph III of the attached Petition.

Specification of Errors Assigned

The errors assigned and points to be argued, as set forth in the attached Petition for Certiorari, are as follows:

(a) The error of the Circuit Court of Lee County, Florida, in imposing sentence upon petitioner after reversal of verdict and judgment of conviction and before retrial could be had.

(b) The refusal of the Circuit Court of a hearing upon his Motion to Quash the Information upon factual grounds.

(c) The refusal of the Circuit Court of Lee County, to determine the issues raised by his Motion to Suppress the evidence illegally seized from his dwelling house and to return the same to him, and the allowing by the Court of said evidence to be received by the jury over the objection and exception of the petitioner.

(d) The action of the Supreme Court of Florida in discarding its rule for construction of statutes and applying a rule not hitherto applied to the search and seizure statute, thus virtually modifying the statute and making it an *ex post facto* law.

ARGUMENT

Point One

(a)

The Circuit Court of Lee County, Florida, denied petitioner due process of law and the equal protection of the laws of Florida in contravention to Section One of the Fourteenth Amendment to the Constitution of the United States by sentencing him to eighteen months' imprisonment in the State prison without trial, after the said Court had reversed the prior verdict and judgment against him and granted him a new trial and before such new trial could be had.

The information in this case (R. 1-3) contains three counts but charges only one offense. The Opinion of the Supreme Court of Florida in the case now at bar conceded this to be true. We quote from the Opinion as follows (R. 25): (emphasis ours)

> "The appellant being informed against by an information in three counts, each count charging violation of Sec. 849.09 Florida Statutes 1941, same F.S.A., was tried and convicted under each of the three counts of the information.
>
> "On hearing for motion for new trial the court denied the motion as to the conviction under counts 1 and 2 of the information but granted the motion as to the third count on the ground 'that the verdict is not sustained by the proof.' The third count of the information charged that Marion F. Johnson on the 28th day of July, 1945, in Lee County, Florida, 'did unlawfully and feloniously have in his possession lottery tickets commonly known as bolita tickets, which said lottery was for money and which lottery tickets represented an interest in a lottery scheme or device not yet played.' There was no evidence that

the accused had in his possession lottery tickets at the time alleged in the information."

• • • • • • •

"(R. 31)

"*It is well settled that the Information here under consideration, charged only one offense* but charged in separate counts, the commission *of that offense by different acts.*. See Bueno *vs.* State, 40 Fla. 160, 23 So. 862; Jarrell *vs.* State, 135 Fla. 736, 185 So. 873."

The case of *Bueno* v. *State,* 40 Fla. 160, 23 So. 862, cited with approval by the Supreme Court of Florida, in the case of *Johnson* v. *State, supra,* expressed law of this case. We quote from the opinion of *Bueno* v. *State,* as follows: (emphasis ours)

"*The information was for one offense only, though in the several counts it was charged to have been committed by different methods embraced within the alternative provisions of the statute.* The punishment was the same, and the offense was the same,—felony,—no matter which count was covered by the verdict, and the guilt of the defendant was the same whether he violated the statute by doing the acts charged in one count or by doing every act embraced within all the counts. *The punishment prescribed by the statute was the same for a conviction upon one count only as it would have been for a conviction upon all, because the counts did not charge separate and distinct offenses, but the same offense, committed in different ways, to meet the varying aspects in which the evidence might present itself.*"

The above citation was also quoted with approval in the case of *Jarrell* v. *State,* 135 Fla. 736, 185 So. 873, cited by the Supreme Court in the case of *Johnson* v. *State, supra.*

But the Supreme Court of Florida after holding that the Information charged only one offense, and subject to a

single penalty, upheld the Judgment and Sentence of the Lower Court upon the first two counts of the Information. In doing this, the said Court ignored the thirteenth error assigned in that Court (R. 21): "The Court erred in entering Judgment and Sentence."

Let it be remembered that prior to entering the Judgment and Sentence in the instant case, the Circuit Court had reversed the Verdict and Judgment, and granted a new trial upon the third count of the Information. As the Information charged a single offense under which the petitioner was subject to only one penalty, a reversal of the Verdict and Judgment as to the third count operated as a reversal of the entire cause of action.

The Order granting a new trial (R. 18) is as follows:

> "This cause coming on to be heard upon defendant's motion for a new trial and the same having been argued by counsel and the Court being fully advised in the premises,
>
> "IT IS THEREUPON CONSIDERED, ORDERED AND ADJUDGED that the said Motion be, and the same is hereby denied on each and every ground thereof, except as to the third count of the Information, and as to the said third count, Motion for a new trial is granted on the ground that the verdict is not sustained by the proof, to which ruling as to the first and second counts defendant by counsel enters his objection and exceptions thereto."

It will be observed that the Court noted in its Order as follows:

> "To which ruling as to the first and second counts defendant by counsel enters his objection and exceptions thereto."

Thereafter, petitioner appealed from the Judgment and Sentence of the Court upon the first and second counts of the Information. The State of Florida took no appeal

from the Order of the Court reversing the Judgment and Verdict upon the third count.

Section 924.02 F. S. A. provides:

> "An appeal may be taken by the defendant or by the State."

Section 924.07 F. S. A. provides:

> "An appeal may be taken by the State from * * * an Order granting a new trial."

Thus the State had its remedy which it failed to take, and the Order granting a new trial became absolute. Under the Order granting a new trial, petitioner is entitled to a complete hearing under the Statute of the State of Florida *as if no former trial had been had.* The controlling Statute is Section 920.09 F. S. A., as follows: (emphasis ours)

> "920.09 Effect of Granting New Trial. *When a new trial is granted, such new trial shall proceed in all respects as if no former trial had been had,* but where an offense is divided into degrees and the defendant has been convicted of a lesser degree, he cannot thereafter be prosecuted for a higher degree of the same offense.
>
> "*All the testimony in such former trial must be produced anew,* except of witnesses who are absent from the State, or dead, in which event the evidence of such witnesses on former trial may be presented as the same was taken and transcribed by the Court Reporter. Before the introduction of the evidence of an absent witness, the party introducing same must show that due diligence has been used to procure the attendance of said witness at the trial, and that the witness is not absent by consent or connivance of the party moving to introduce the evidence of such witness on the former trial."

We quote the following from *Fernandez* v. *Calaf*, 7 Porto Rico Fed. 371, 373:

> "*A new trial involves two things.* It involves a setting aside of the judgment, because, unless that is done, you cannot get at the verdict, and it involves setting aside the verdict, because otherwise there can be no presentation of new evidence."
>
> • • • • • • •
>
> "The court granted the application of the plaintiff that the new trial be restricted to the question of title. The point now before us is, What was the effect of that modification? It did not modify the judgment. That was out of the way anyhow. That was set aside before we could ever get to the question of a new trial. So this modification did not touch the question of Judgment one way or the other."

An analysis of the situation now before the Court shows that the Verdict and Judgment have been reversed, and that the petitioner has been granted a new trial; that under the statute, as well as under the law of the land, he is entitled to a complete hearing in the entire case.

> "The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause." 12 Am. Jur. 268.

The Verdict and Judgment having been set aside, it necessarily follows that before the petitioner could again be sentenced, he should be tried. Nevertheless, the Court pronounced Judgment without such hearing and thus deprived him of due process of law. It will be observed that the Supreme Court of Florida has recognized that the Information charged but a single offense. The same evidence was offered in support of each count. The case was tried

upon all of the counts by a jury of six men, four of whom have deposed that they would not have convicted the petitioner upon any count of the Information except for the evidence produced upon the third count. We quote from one of these depositions, as follows (R 54-58):

> "Affiant further says, that after the said jury had rendered their verdict, the Hon. W. T. Harrison, Judge of the Circuit Court, of Lee County, who presided at the trial of said cause, passed judgment and sentence on the defendant for the first two counts in said information, omitting the third count, which said count charged defendant with the possession of 'lottery tickets commonly known as bolita tickets.' Affiant further says that had the third count of said information been eliminated before the jury considered their verdict, a different verdict would have been rendered, by this affiant, and that said verdict was based wholly and solely on the belief of this affiant that the pads and paraphernalia introduced by the State in evidence, and which was argued by the State's attorney, and charged by the court or inferred in said charge, were what is known as lottery tickets; affiant further says that had the case been given to the jury on the first two counts only his verdict could not have been other than 'Not Guilty.' Affiant further says that under this statement of facts he feels that there has been a miscarriage of justice."

Unless the petitioner is granted relief by the Supreme Court of the United States, he will be denied his right to a fair and impartial trial on all of the issues raised by the Indictment, although the Judgment setting aside the Verdict and granting him a new trial has never been reversed, modified or set aside.

After his new trial was granted and before his retrial, he was condemned without hearing to imprisonment for eighteen months in the State Prison. This was a denial of due process of law.

The Supreme Court of the United States, in the case of *Windsor* v. *McVeigh*, 93 U. S. 274, 277, 23 L. Ed. 914, said:

> "A sentence of a Court produced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights and is not entitled to respect in any other tribunal."

The Supreme Court of the United States, in the case of *Elliott* v. *Elliott*, 167 U. S. 409, 42 L. Ed. 215, 220, 221, held the striking of an Answer from the files to be a denial of due process of law, and said: (Text L. Ed. 220)

> "The fundamental conception of a law of justice is condemnation only after hearing. To say that Courts have inherent power to deny all rights to defend action and to render decrees without any hearing whatever, is however in the very nature of this, to convert the court and exercise such an authority in an instrument of wrong and oppression and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

The Supreme Court of the United States, in the case of *Chambers* v. *State of Florida*, 309 U. S. 227, 60 S. Ct. 472, said:

> "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provisions of the Fourteenth Amendment,—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority."

Point Two

(b)

The Circuit Court of Lee County, Florida, denied him due process of law and the equal protection of the laws of the State of Florida by denying him the right to a hearing upon his motion to quash the information upon factual grounds, the said motion being in effect a plea in abatement of the said action and a defense thereto recognized by the laws of the State of Florida.

The Paragraphs numbered I, II, and II of the Motion to Quash the Information (R. 3-6) were considered by the Supreme Court of Florida as a plea in abatement but were allegedly found defective by said Court for the reasons stated in Paragraph number (5) of the Opinion of the Court. See *Johnson* v. *State*, 27 So. 2d 276, as follows:

> "The legality of an indictment or information may not be challenged by plea in abatement or motion to quash alleging that the indictment or information is based on insufficient evidence to warrant the action of the grand jury in returning the indictment, or the action of the prosecuting officer in presenting the information, as the case may be. See *Richardson* v. *State*, 100 Fla. 835, 130 So. 718; *Prevatt* v. *State*, 135 Fla. 226, 184 So. 860."

It will be noted from the language of the Motion to Quash that there was no claim made by the petitioner *that the Information was based on insufficient evidence to warrant the prosecuting officer in presenting the said Information.* The contention of petitioner was that the State of Florida, through its officers and agents, had violated the Constitution and laws of the State of Florida by unlawfully entering his dwelling house by force and seizing the articles described in the officer's return to the Search Warrant and that the con-

duct of said officer was a violation of statutes of the State of Florida. Thus the Supreme Court of Florida reached its conclusions not by anything contained in petitioner's Motion to Quash. That the Supreme Court of Florida has upheld the right of litigants to attack the Information or Indictment against them by plea in abatement is shown by its decisions in the case of *White* v. *State,* 126 Fla. 760, 171 So. 809, and in the case of *Hyde and others* v. *State,* 190 So. 497. It, therefore, appears that the Court, in determining that petitioner could not avail himself of this remedy, has denied him equal protection of the laws of Florida which it has extended to all others in like circumstances.

It was the intention and purpose of the petitioner in his Motion to Quash upon factual grounds to show that his constitutional rights had been invaded and that he claimed such right under Section 22 of the Declaration of Rights of the Constitution of Florida and Section One of the Fourteenth Amendment to the Constitution of the United States. A proceeding before the State Attorney in the Courts of Florida for the purpose of obtaining an Information is equivalent to similar proceedings before the grand jury for the purpose of obtaining an indictment. See *Prevatt* v. *State,* 135 Fla. 226, 184 So. 860. The Supreme Court of the United States has held that a proceeding before a grand jury for the purpose of determining whether or not a crime has been committed is a "criminal case" within the meaning of the constitutional provision against self-incrimination. See *Counselman* v. *Hitchcock,* 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110. In the case of *U. S.* v. *Edgerton, D. C.,* 80 Fed. 374, the Court said:

> "It is fatal to the indictments that the defendant is called to testify in the particular matters from which they resulted."

The foregoing cases were cited with approval by the Supreme Court of Florida in the case of *State of Florida* v. *Coleman*, 187 So. 793. In that case the Court held, among other things, that the Supreme Court of Florida was not dependent on the Fifth Amendment to the Federal Constitution, but that the Federal Court decisions based on this provision might be relied on as authority for disposition under Section 12 of the Declaration of Rights for the State of Florida. In that case a man had been summoned directly before the Grand Jury, and afterwards he had been charged with perjury for false testimony given before that body; he was tried and convicted in the Criminal Court of Record in Dade County, Florida, and from the judgment in that case, he sought habeas corpus. The Court, in its first hearing, ordered him discharged, holding that the term "criminal case", as used in Section 12 of the Declaration of Rights of the State of Florida, had the same meaning as the same term used in the Fifth Amendment to the Constitution of the United States, and that it not only invalidated the Information filed against him, but that the entire proceedings were null and void. In the second hearing of that case the Court found that the relator had been advised of his Constitutional rights at the time of testifying before the grand jury, but that he had voluntarily waived his privilege against self-incrimination. The Judgment discharging the prisoner was for this reason reversed and he was remanded. The Court said:

> "We think the petitioner waived his constitutional rights and there was no error in the order of the court denying a writ. The order appealed from is hereby affirmed. The original opinion entered in this cause, insofar as it conflicts with this opinion, is hereby altered, modified and overruled."

The original opinion, therefore, stands as the law of the State of Florida to the effect that a violation of the Consti-

tutional provision against self-incrimination will render an Indictment or Information void, *unless the accused has waived his constitutional right.*

It must be plain that if requiring one accused of crime to appear personally before the grand jury to incriminate himself would be a denial of his constitutional rights and would void the Indictment or Information against him, that the State could not reach the same result by taking the evidence from him by force and against his will and presenting it to the grand jury for the same purpose. And what would be true of a grand jury would, of course, be equally true of a prosecuting attorney who was acting in the same capacity as a grand jury. It, therefore, follows that if the Motion to Quash was not insufficient in the manner pointed out by the Supreme Court of Florida, that he was entitled to a hearing upon it and that the Motion to Strike the said Motion to Quash was an admission of all the facts alleged therein, and the striking or denial of said Motion was a denial to him of due process of law and equal protection of the laws of Florida, contrary to Section One of the Fourteenth Amendment to the Constitution of the United States.

The objection of the petitioner made at the time of the denial of his Motion to Quash appears on Page 42 of the printed record, as follows:

> "Now comes the defendant and objects to the ruling of the court striking his motion to quash upon the factual grounds for the reason that the ruling denies the defendant the right to trial by jury upon said issues as guaranteed by the Constitution of the State of Florida and denies him due process of law as guaranteed by the Constitution of the State of Florida and Section One of the Fourteenth Amendment to the Constitution of the United States."

Petitioner further called the Court's attention to this error in the sixth ground of his Motion for New Trial (R. 17):

> "6. The court erred in sustaining the motion of the State to strike those portions of defendant's motion to quash the indictment that were based upon factual grounds."

And at the conclusion of his Motion for New Trial (R. 18), he stated as follows:

> "For all of which matters and things above urged and insisted upon, defendant avers that he has been denied due process of law in contravention of Sections 12 and 22 of the Declaration of Rights of the Constitution of the State of Florida and Section One of the Fourteenth Amendment to the Constitution of the United States."

In his Assignment of Error filed in the Supreme Court of Florida, the ruling of the Court in this particular was assigned as the second, fourth and tenth errors (R. 19, 20, 21). It thus appears that the Federal question was duly raised upon every occasion offered during the progress of his trial.

This point was duly argued in the Supreme Court of Florida, as witness *Johnson* v. *State,* 27 So. 2d 276, text 279:

> "The defendant has presented six questions which he urges for our consideration, as follows:
>
> • • • • • • •
>
> "Question Two: Did the lower court deny the defendant due process of law in violation of Section 12 of the Declaration of Rights of the Constitution of Florida and Section One of the Fourteenth Amendment to the Constitution of the United States by denying him the right to be heard upon the factual grounds stated in his motion to quash the information?"

And the Supreme Court discussed the question, determining it against him solely upon the proposition quoted from the Opinion of said Court at the beginning of the discussion of this point.

In the case of *Ex parte Livingston,* 116 Fla. 640, 156 So. 612, the Supreme Court of Florida said:

> "The point is that the defendant had presented a plea in abatement to the indictment and on issue joined had a constitutional right to a trial of that issue by a jury if it presented a matter *in pais,* and that right could not be taken away from him by any judge except by due process of law. See *Woodward* v. *State,* 33 Fla. 508, 15 So. 252."

In the case of *Taylor* v. *State,* 117 Fla. 706, 158 So. 437, the Court reversed a conviction because the defendant's pleas were stricken upon motion by the State, and held:

> "It was error to strike the pleas in abatement, which error we hold to be a substantial nature impairing a constitutional right secured to the accused. The judgment of conviction in each case is reversed."

The Supreme Court of Florida in the case of *Marks* v. *State,* 115 Fla. 497, 155 So. 727, correctly states the rule with regard to procedure in striking pleas:

> "Where a plea in abatement is defective in matters of substance, it should be attacked by the State through a demurrer to the plea while if it is untrue in fact, the issue should be joined on the plea by means of a replication. It is error for a court to summarily order and adjudge that a plea in abatement be overruled and denied where there has been no demurrer interposed thereto questioning its legal sufficiency as a matter of law, even though the plea may in law be insufficient to withstand a demurrer properly interposed."

The Supreme Court of the United States in the case of *Edwards* v. *U. S.*, 312 U. S. 473, 61 S. Ct. 669, said:

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But the procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirements that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

POINT THREE

(c)

The Circuit Court of Lee County, Florida, denied him due process of law and the equal protection of the laws of the State of Florida by refusing to determine his motion to suppress and to return to him articles of evidence illegally seized from his dwelling house; and by requiring the jury to determine the legality and admissibility of such evidence over his objection and exception.

This question, while similar, is not to be confused with the previous question. Each issue was raised separately and distinctly in the Florida courts. Before arraignment, petitioner filed his Motion to Suppress the evidence and for a return of the property illegally seized. The Motion to Suppress raised questions of fact as well as questions of law. The questions of fact were issuable (R. 10-12). The State moved to strike petitioner's Motion, but the Court consented to hear evidence. After hearing evidence, however, the Court declined to consider and weigh the evidence

and refused to determine the issues raised, but sustained the Motion of the State of Florida to strike the same. The ruling of the Court is found upon Page 13 of the record, as follows:

> "Thereupon, the said defendant, by and through his said attorneys, filed a motion to suppress the evidence in the case, and the State, by its attorneys, presented a motion to strike said defendant's motion to suppress the evidence in the case. Thereupon, the motion to suppress the evidence and the motion to strike said motion came on to be heard, and the Court having heard the evidence in the case, and after argument of counsel for the State and the defendant, and the Court having considered, granted the State's motion to strike and denied the defendant's motion to suppress the evidence herein."

Page 112 of the record contains the following recital:

> "By the Court: Motion to suppress denied—motion to suppress the testimony. So far as the motion to quash does not allege with any certainty that the information is based solely or wholly on the matters and facts which it is alleged were obtained illegally, the Court is of the opinion the same is not sufficient in law coming in at this time. The defendant has full opportunity also of presenting those matters to the Court and to the jury in the trial of the case; likewise, motion for that reason is denied, leaving the grounds not moved against to be presented and argued to the Court."

Thereafter, all the evidence sought to be suppressed was offered and received over his objection during the trial.

The Supreme Court of Florida, in its Opinion, seems to have misapprehended the facts contained in the record of this case. We quote from their Opinion with reference to the Motion to Suppress as follows (R. 35, 36):

> "Aside from the challenge of the sufficiency of these documents there was two allegations of fact going to the

legality of the search and seizure. The first of these allegations was that the dwelling house authorized to be searched by the warrant was broken and entered by the sheriff without his first having given notice that he was armed with a search warrant and intended to search the house for gambling paraphernalia. The other was that he made the search and seizure without serving the warrant on Marion F. Johnson. The court heard testimony pro and con as to these allegations. The testimony was conflicting, but the court determined that the allegations were not sustained by proof. The court had the benefit of seeing the witnesses face to face and was in a better position than are we to judge who was and who was not telling the truth and it was the court's province to determine this and the court, exercising its powers and judicial discretion in this regard evidently reached the conclusion that the sheriff and those witnesses who supported his version of the transaction were telling the truth and that there was no breaking and entering of the house but the entry was peaceable and without breaking and also that the search warrant was read to Marion F. Johnson and a copy of it delivered to him inside the house before any search and seizure was made."

It is true that the petitioner did offer testimony to support his Motion to Suppress, but there was no conflict in the testimony except a denial by the Sheriff himself that there was a door at the place where he entered. The conclusion of the Supreme Court to the effect that *"the court determined that the allegations were not sustained by the proof"* is not borne out by the record of this case. The record shows that after hearing the evidence the Court sustained the Motion of the State to strike petitioner's Motion to Suppress and did not pass upon the sufficiency of the evidence, but submitted the evidence to the jury along with the other issues of the case. Petitioner contends that in addition to his right to be heard upon his Motion to Suppress and for a return of the articles taken by the illegal search, *he was entitled to a*

decision by the Court upon the issues raised by his Motion. He was denied this privilege, and the Circuit Court did not *determine that the allegations were not sustained by the proof* but shifted the responsibility of such determination to the jury in the case. The petitioner had presented a timely Motion upon which he was entitled to a hearing and to a decision upon the issues raised thereby. He was denied this right, which is a privilege accorded to other litigants in the Courts of the State of Florida, and was therefore denied due process of law as well as the equal protection of the laws of the State of Florida.

Petitioner's Motion to Suppress evidence and for the restoration to him of the said evidence (R. 10-13) was in compliance with procedure recognized by the Courts of Florida under the same rules that apply to Federal Courts. Under these rules, it is recognized that the Court should hear the evidence, in the absence of a jury, and determine its admissibility. The Supreme Court of Florida, in the case of *Robertson* v. *State,* 94 Fla. 770, 114 So. 534, 537, said:

> "When the admissibility of evidence depends upon the legality of the search and seizure by which it was procured and the latter question in turn rests upon the determination of a question of fact, which is susceptible of controversy, the better and safer practice is to move in advance of trial to suppress or restore the evidence in question, so that it will not be necessary to interrupt the progress of the trial for the determination of a controverted collateral issue, although such a preliminary motion is not always indispensable."

The Supreme Court of Florida, in the case of *Sanchez* v. *State,* 133 Fla. 160, 182 So. 645, said:

> "The functions of such a preliminary motion are (a) to test the legality of the search and seizure in advance of the trial upon the issues, thereby enabling the trial

judge to determine what ruling should be made if the illegality of the search be offered as an objection to the evidence at the trial; and (b) to establish a foundation for a timely objection at the trial if the motion to suppress be overruled. The necessity, in some instances, for the interposition of the motion prior to trial, is found in the rule frequently applied that ordinarily, and subject to certain objections. (See Amos *v.* U. S., 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654; Gouled *v.* U. S., 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Agnello *v.* U. S., 260 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (51 ALR, 409); Holmes *v.* U. S. (C. C. A.) 275 F. 49, a court will not halt the trial of the litigation in chief and embark upon the trial of a collateral issue for the purpose of determining the competency or admissibility of proffered evidence as against an objection that it was procured by illegal means."

The Motion to Suppress and to return to the appellant property of which he had been unlawfully disseised distinctly raised questions of the denial of due process under the most ancient law of the land. We quote from Section 39 of the Great Charter:

> "39. No freeman shall be * * * disseised * * *, nor will we pass upon him * * * unless by the lawful judgment of his peers or by the law of the land."

Thus the Motion to Suppress raised the question that the petitioner had been unlawfully disseised of his property by the State of Florida which had seized it from his dwelling house for the sole purpose of using it as evidenec against him and was still holding it to be used as evidence against him although the right of the State to such property had not been determined by the lawful judgment of his peers or the law of the land. Petitioner had a right to the return of this property before his trial since the very purpose of its seizure, according to his Motion to Suppress, was for its use as evidence against him.

Section 52 of the Great Charter provides:

> "52. If anyone has been dispossessed or deprived by us without the legal judgment of his peers, of his lands, castles, liberties, or right, we will forthwith restore them to him."

Due process required that the property unlawfully seized from him be restored to him before the trial. The very purpose of making a Motion for Suppression of evidence and to return property before trial is for the double protection of regaining the property and for preventing it being used at his trial. Nevertheless, the Court in this case abdicated its responsibility and submitted the seized articles to the jury to determine whether or not they were illegally seized and at the same time to determine his guilt or innocence.

Petitioner, therefore, urges that he was entitled not only to a hearing upon his Motion to Suppress and for a return of the articles seized from him, but that he was entitled to a *determination by the Court,* and that the refusal of the Court to determine the issues so raised was a denial to him of due process of law and of the law of the land.

For objections and rulings upon the admission of the evidence concerning which the Court had refused to determine the admissibility thereof before trial, see Record Pages numbered 117, 118, 119, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 145, 152, 153, 164, 170, 171, 179, 182, 185, 190, 202, 205. Let it be remembered that the Court submitted to the jury not only the question of the admissibility of the articles seized from petitioner's dwelling house, but also submitted to them the question raised by the Motion to Suppress of the legal sufficiency of the Search Warrant; and both the Search Warrant and the Affidavit upon which

it was based were submitted to the jury for their determination of its sufficiency. We quote as follows (R. 118-119):

> "At this time the State offers into evidence the documents that have been identified as the original affidavit and the original search warrant which was the basis of the sheriff's raid on the premises of Marion F. Johnson. Now comes the defendant and objects to the offering, receiving and filing in evidence of each of said documents for the following reasons: 1st, because the said documents are incompetent to prove the issue now before this jury. 2nd, the said purported affidavit introduced as a basis for the alleged search warrant constituted evidence which is inadmissible in the trial of this cause. 3rd, because there is no law of the State of Florida, nor any rule of evidence recognized by the State of Florida wherein an affidavit may be made evidence in the course of a trial. And the defendant further objects to the introduction of the said affidavit and search warrant in that the said search warrant is directed at the private dwelling of the defendant and the said affidavit does now show probable cause for the issuance of said search warrant; neither the affidavit nor the search warrant particularly describes the person or persons or thing or things to be searched and seized. 3rd, because the purported search warrant is directed at a private dwelling house, alleged to be that of the defendant, and it has not been shown that there were upon the premises, or that the premises were being used for the unlawful sale, possession or manufacture of intoxicating liquor, or stolen or embezzled property, or that it was used in part for some business purpose such as a store, shop, saloon, restaurant, hotel, boarding house or lodging house, and defendant avers that said search warrant is null and void by reason of the fact that it fails to comply with Section 933.18 F. S. A., and that the issuance of said search warrant against the private dwelling house of the defendant was issued for the purpose of obtaining evidence to be produced against him in the prosecution of this case and that the same is in violation of sections

12 and 22 of the Bill of Rights of the Constitution of Florida, and section 1 of the 14th amendment to the Constitution of the United States. Defendant further avers that he stands ready at this time or later in the progress of this cause, as the court may direct, to produce evidence in support of his said objection.

The Court: Objection to the introduction will be overruled; you may proceed."

The attorney for the State of Florida argued to the jury that it was their province to determine whether the search and seizure were legal or illegal. We quote from argument to jury by counsel for the State as follows: (R. 252) (emphasis ours)

"Now, gentlemen of the jury, I want you to remember that not what these attorneys say, including myself, is what you are to go by; and what these attorneys say isn't a factor in this case, and when counsel for the defendant tells you that was an illegal search and seizure in this case that is a mere conclusion on their part, because, as I have already told you once, you gentlemen are the ones to decide whether or not the search made by the sheriff in this case was legal and lawful search, or unlawful, I am sure that the judge will charge you on searches and seizures and then you gentlemen will have to take that law and then take the facts that have been given to you by the sheriff and his deputies, Mr. Baker and Mr. Mathis, and consider that and then take the testimony of the witnesses for the defendant, *negro* cook and the *negro* helper, and those two men who were buying land from Doc and make up your minds whether or not that was a lawful or unlawful search. Of course, if the sheriff broke in it was an unlawful search, but if the sheriff went in, as he and his deputies say, he went in and there was no unlawful search, as I understand the law, and that is a matter for you gentlemen to determine, as a matter of fact in this case, along with your determining the innocence or guilt of the defendant.

"Now, even if it be true, even if you gentlemen should decide that you are going to believe Mary Adams and Lance and that big, fat *negro,* and the one who was outside hanging around there for half an hour, instead of believing the sheriff and his deputies, if you should decide the search and seizure in this case were unlawful, then these things here should be put aside and disregarded, and when you have done that you should go into the facts in this case, other than those things and the testimony about those particular things, and decide whether or not the defendant is innocent or guilty."

(The attorney for the State of Florida was concerned that it should appear of record that some of the witnesses for petitioner were negroes. Witness from Page 77 of the Record, upon the cross-examination of Harvey Williams:

"Q. In order for the record to be straight on this, are you a white man or a negro?
A. I am a negro."

From the cross-examination of L. R. Merritt, Page 218 of the Record:

"Q. Merritt, are you a white man or a colored man?
A. I am a colored man.")

With regard to the legality of the search, the Court instructed the jury, as follows (R. 258):

"You will be privileged to take with you to your jury room the various exhibits which have been offered and received in evidence in this cause. Much has been said to you and in your presence as to whether or not there had been a legal or illegal search made in this case. I charge you that under the laws of Florida an officer serving or attempting to serve a search warrant may break a door or window, or may force their entrance into a house only after due notice. Therefore, if you find from the evidence in this case that the sheriff had forced an entrance by the breaking of any fastening

to the door on the premises described in this search warrant, then the execution or service of that search warrant would, under the law of Florida, be illegal and it would be your duty to discard or disregard any and all articles, implements or paraphernalia taken by virtue of the search warrant. It would likewise be your duty to discard the testimony of any person whose name was obtained only by virtue of the information obtained through the search warrant or the records obtained thereunder."

It, therefore, appears from the record that the refusal of the Court to determine the issues raised by his Motion to Suppress and to return the articles illegally seized from him before the trial, and the submission of such illegally obtained evidence to the jury for their determination was a denial to him of due process of law and the equal protection of the laws of the State of Florida.

POINT FOUR

(d)

The Supreme Court of Florida, by its interpretation of Section 933.18 F. S. A., changed the meaning and effect of said law after his trial to his prejudice, in violation of Section Ten of Article One of the Constitution of the United States, thereby rendering said statute as applied to him ex post facto.

The Supreme Court, in its Opinion, said (R. 34-35):

"It is the contention of appellant that the second paragraph of this section is of no force and effect because it is in conflict with the first paragraph of the section. We cannot follow this reasoning because it is well settled rule of construction that the last expression of the legislative will is the law in cases of conflicting provisions in the same statute or in different statutes

the last in point of time or order of arrangement prevails. See 59 *C. J.* 999 and authorities there cited. There are exceptions to this rule, as pointed out in Sams *v.* King, 18 Fla. 557; Hall *v.* State, 39 Fla. 637, 23 So. 119; State ex rel. *v.* Bessinger, 155 Fla. 730, 21 So. 2d 343. In each of these cases it was held in effect that where the last sentence in one section of a statute is plainly inconsistent with the preceding sections which conform to the legislature's obvious policy and intent such last sentence, if operative at all, must be so construed as to give it effect consistent with such other sections and part of sections and with the policy they indicate. The last paragraph of Sec. 933.18, *supra,* is more nearly consistent with other sections of the same chapter than is the first paragraph of this section. See subparagraph (2) (b) of Sec. 933.02 and Sec. 933.07, Fla. Statutes 1941, same F. S. A. This paragraph of Sec. 933.18 is also in perfect harmony with Sec. 22 of the Declaration of Rights of the Florida Constitution.

"So our conclusion is that insofar as the provisions of the second paragraph of Sec. 933.18, *supra,* conflict with the provisions of the first paragraph thereof, the provisions of the second paragraph prevail. It, therefore, follows that we hold the affidavit sufficient as a basis for the warrant and the warrant sufficient as authority for the search and seizure thereunder."

It will be noted that the Supreme Court places an unmerited and unjustified burden upon petitioner when it accuses him of contending "that the second paragraph of this section is of no force and effect because it is in conflict with the first paragraph of the section." This was directly the opposite contention of the appellant. He contended then and contends now that the second paragraph of this section, as written by the Legislature, is not in conflict with any other portion of said statute or any other statute. No Court in the State of Florida had ever held that the second paragraph of the statute conflicts with the first paragraph thereof. The construction heretofore applied to this statute

was that each section was a limitation upon obtaining search warrants for dwelling houses and that the second section, in providing for the proof upon which a search warrant for a dwelling house may issue, does not enlarge the limitations of the first paragraph. If a dwelling house is being used to carry on gambling or being used to perpetrate fraud and swindles, it may be searched under the provisions of the first paragraph provided it is also being used for one of the purposes therein named; otherwise it may not. There is absolutely no conflict in the statute, and it is not ambiguous; and the construction placed upon it by the Court in this case makes a new statute and changes the rules of evidence to the prejudice of the petitioner. If the statute be construed as it was construed before and at the time of the commission of the alleged offense and at the time of the alleged search, the Search Warrant was wholly void; the decision of the Supreme Court has breathed vitality into the void Warrant upon which the evidence by which his conviction was procured was obtained.

This question was raised in the Supreme Court of Florida after that Court had changed the interpretation of the statute (R. 47, 48, 49, 52, 53.) We quote as follows: (R. 52, 53)

> "Appellant further avers that prior to the issuance of the search warrant complained of, and prior to his trial and conviction, the Courts of this state have consistently held that a dwelling house may not be searched because it is used to carry on gambling unless it is being used for the unlawful sale, possession or manufacture of intoxicating liquor, or that stolen or embezzled property is contained therein, or *unless it is used in part for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding or lodging house.* And the court has overlooked that the State of Florida concedes that the dwelling house of the Appellant was not used for the unlawful sale, possession or manufacture of intoxicating liquor, or for stolen or embezzled prop-

erty, and that it was not in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding or lodging house. The Supreme Court, in its opinion and judgment aforesaid, in construing said Section 933.18 F.S.A., heretofore cited in this petition, has varied the rules of this Court for construction of statutes to the prejudice of the defendant by now construing that the second paragraph of said statute is in conflict with the first paragraph of said statute and by holding that the limitation contained in the first paragraph does not apply to the second paragraph thereof with reference to the issuance of search warrants where a dwelling house is alleged to be used to carry on gambling; and the Appellant avers that in so construing said statute the Court has not applied the rule for construction that was in force and effect at the time of the alleged search and seizure and at the time of the trial and conviction of the Appellant, in that the Rule of construction heretofore observed by this Court and all other courts of the State of Florida was that if any part of a statute might operate without being held in conflict with another part, it was the duty of the court to find said field of operation. And Appellant avers that the construction now placed upon the statute renders it *ex post facto*, and he cites the same as construed by this Court and calls the same in question as being contrary to Section 17 of the Declaration of Rights of the Constitution of Florida and Section 10 of Article One of the Constitution of the United States and of Section One of the 14th Amendment to the Constitution of the United States.

"Wherefore, Appellant prays that he may be reheard upon the construction of said statutes with respect to the constitutional provisions cited and that he may be reheard by the court *en banc.*"

We are aware that decisions of the Supreme Court of the United States indicate that the provisions of Section Ten of Article One of the Constitution of the United States pertains only to *statutory law.* But such was the holding of this Court with respect to the phrase "laws of several states"

appearing in certain statutes; but upon a re-examination of the question involved the Court reinterpreted the language used in the statutes and found that it must take into consideration the law as declared by the Courts. In the case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, held:

> "The phrase '*laws of the several states,*' as used in statutes requiring Federal Courts to apply laws of several states except in matters governed by Federal Constitution or statutes, held to include not only state statutory law, but also state decisions on questions of general law, in absence of any constitutional provision purporting to confer upon federal courts power of declaring substantive rules of common law applicable in a state."

Petitioner, therefore, claims that the statute, as interpreted by the Supreme Court of Florida, is in violation of Section Ten of Article One of the Constitution of the United States in that it is an *ex post facto* law by judicial interpretation.

We, therefore, ask a reopening and a re-examination of the question as it involves the law of the States referred to in Section Ten of Article One of the Constitution of the United States.

Conclusion

Having made it appear that the questions raised in the Courts of Florida involved questions of due process and other constitutional questions which give this Court jurisdiction, we respectfully pray that Certiorari be granted so that the entire record may be examined by this court.

Respectfully submitted,

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Counsel for Petitioner.